U.S. Department of Labor

Office of Administrative Law Judges
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Date Issued: May 18, 2000

Case No: 1999-ERA-3

In the Matter of

JOHN LAZUR,
BRAD HINES,
TOM VANDER TUUK,
JASON LAX,
MICHAEL JOHNSON,
DEMETRIOS OLANDEZOS,
JAMES PAWLICKI,
JOSEPH RODINO,
ESEQUIEL SAN MIGUEL,
LOUIS SOTO,
PAUL TARNOWSKI,
THOMAS PARKINSON,
DIONISIO PINEDA,
DAVID ROGERS,
WILLIAM SHARP,
EDWARD SOVICH,
MARJAN TRAJKOVSKI,

Complainants,

v.

U.S. STEEL - GARY WORKS,

Respondent.

APPEARANCES:

Fred W. Grady, Esquire
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Pennsy Place, Suite A
Valparaiso, Indiana 46383
For the complainants

Terence M. Austgen, Esquire
9245 Calumet Avenue
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Munster, Indiana 46321
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act [ERA], 42 U.S.C. § 5851, and the regulations promulgated thereunder, 29 C.F.R. Part 24 (1998). The ERA grants protection to employees in the nuclear power industry from employment discrimination resulting from commencing, testifying at, or participating in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et. seq.*

Seventeen systems repairmen employed by U.S. Steel filed an employment discrimination complaint under the ERA on June 18, 1998. After an investigation, the Occupational Safety and Health Administration (OSHA) determined the complaint had merit in two of the four areas of discrimination alleged. Both parties appealed this determination and requested a hearing before the Office of Administrative Law Judges. A hearing was held at Chicago, Illinois on July 20 through 23, 1999. Both parties submitted evidence and were afforded the opportunity to file post-hearing briefs and reply briefs.[1]

ISSUES AND STATEMENT OF THE CASE

This case involves two issues. One is whether the respondent's appeal of OSHA's determination should be considered timely. The second and principal issue is whether U.S. Steel discriminated against the seventeen complainants because of the employees' engagement in protected activity. Complainants contend that U.S. Steel discriminated against them because they inquired about their dosimeter or radiation badge readings, then contacted the Nuclear Regulatory Commission (NRC) after discovering their badges had been lost. The four areas of alleged discrimination are: (1) the elimination of the complainants' privilege of driving their personal vehicles into the plant; (2) the reduction of their telephone privileges at work; (3) changing of their work schedules from mostly a day shift to a rotating shift commonly called the Timkin schedule; and, (4) a reduction in their overtime hours due to the change to the Timkin schedule. It is U.S. Steel's position that all of the alleged adverse work actions were taken for legitimate non-discriminatory reasons.

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[1]References in this decision to ALJX, CX and RX pertain to exhibits offered by the administrative law judge, complainants and respondent, respectively. The transcript of the hearing is cited as "Tr." and by page number.

FINDINGS OF FACT

Protected Activity

U.S. Steel operates the Gary Works steelmaking facility in Gary, Indiana. The complainants in this case are seventeen employees who work as systems repairmen in the plate mill of the Gary Works facility. The systems repairmen are members of the United Steelworkers of America Union and are covered under a collective bargaining agreement. (RX 2). The complainants are responsible for maintenance and repair of two Daystrom isotope gauges located at the east end of the plate mill. Each of the gauges contains twenty curies of Cesium 137 and both gauges are licensed with the NRC. (ALJX 7; CX 5). While working on the gauges, the systems repairmen wear dosimeter badges which measure the amount of radiation in the area. The badges are provided by U.S. Steel each month and are sent to an outside agency for evaluation and data collection. (Tr. 104, 308, 356).

U.S. Steel designated a new supervisor for the systems repairmen in early 1997. Prior to that time, the systems repairmen had experienced no difficulty in requesting and receiving their dosimeter badge information from their previous supervisor. However, complainant John Lazur stated that he asked the new supervisor for his badge data once between March and December of 1997, but never received the information. Around April of 1997, Marjan Trajkovski asked the new supervisor for his badge data, and although the new supervisor stated that he would look into it, Mr. Trajkovski never received the information. Similarly, complainant Jason Lax requested his dosimeter badge information from the new supervisor in mid-1997, but did not receive the information. Within a month after the request, he asked the new supervisor about the badge readings. The supervisor said he would look into the matter but the information was never received. Dionisio Pineda stated that in late summer of 1997, the new supervisor responded with an expletive when Mr. Pineda asked for his badge data and was told that he was acting like another employee whom always raised safety concerns. Mr. Pineda stated that he was scheduled to work several weeks of evening and midnight shifts after making this request. Sometime prior to April 29, 1998, complainant Michael Johnson requested his badge data from a process control technician but never received the information. (Tr. 310-12, 339-46, 356-59, 480-82, 619-21, 1030).

The NRC conducted an inspection of U.S. Steel on April 6, 1998 and an in-office review through April 15, 1998. As a result, U.S. Steel received a Notice of Violation on April 20, 1998. The NRC reported that U.S. Steel's "conduct of licensed activities were generally characterized by safety-conscious nuclear gauge operations and sound health physics practices" but that one violation of NRC requirements was found which involved "failure to have film badges processed monthly to obtain dosimetry results" between January 1995 and April 6, 1998. (RX 3). Specifically, the NRC inspector reported that the badges assigned to maintenance, operating and supervisory personnel, regularly assigned to the immediate area of a nuclear device, were not changed monthly to provide dose information because the badges were not sent for processing. (RX 4). The company subsequently determined that the employee responsible for submitting the

badges for processing for the entire Gary Works had lost them for that period of time. (Tr. 838-839).

Around the third week of April 1998, the Manager of Operations was informed by telephone by the Radiation Safety Officer that the employees' dosimeter badges were missing. The operations manager arranged to have a meeting on April 29, 1998 with the systems repairmen so that representatives of the manufacturer of the isotope gauges could discuss safety training with the repairmen. He arranged for personnel in the company's medical department to consult with medical facilities about the possible effects of radiation exposure because of the lost badges, so that the systems repairmen could be appropriately apprised of the situation from a medical standpoint. He also requested U.S. Steel's Employee Assistance Program to provide counseling to those systems repairmen concerned about the lost badges. (Tr. 839-841).

After taking these immediate steps, the Manager of Operations next asked some experts to determine if the shutter on the isotope gauges could inadvertently open and if so, to measure the possible extent of radiation exposure to the systems repairmen during the time the dosimeter badges were lost. This assessment resulted in the so-called Huber report. The research for the report included an inspection of the gauges for ambient radiation exposure rates used in conjunction with other documentation such as personal exposure histories, review of U.S. Steel and Gary Works procedures, and interviews with the Radiation Safety Officer. (CX 5; Tr. 837-44).

The systems repairmen were disturbed by their badges being lost and several of the employees requested their dosimeter badge information after the company's disclosure that the badges had been lost. The employees received some information, but were not satisfied and a few of the complainants continued to request information. (CX 4, Tr. 107, 281-87). After their April 29, 1998 meeting with management, the systems repairmen met and discussed their concerns. (Tr. 645-46). Complainant John Lazur contacted the NRC after the April 29, 1998 meeting regarding these concerns.

The NRC performed another inspection on May 14 and 15, 1998. The NRC determined that from November 1991 to May 14, 1998 U.S. Steel employees entered areas where the beam of the radiation device may have been present. The agency found that personnel entered the beam area without proper lock-out of the nuclear gauge source shutter. (RX 5, 6). The NRC determined that this was due to inadequate training.

A second meeting was held with the systems repairmen on June 18, 1998 and the Huber report was discussed with them. (Tr. 843). The complainants felt that the purpose of the second meeting was to tell them it was safe to continue working on the gauges. (Tr. 106, 198-200). However, they were concerned about their lifetime radiation dosages and stopped working on the gauges until they received further reassurances from management that it was safe to continue. (Tr. 106-09, 210-18). The systems repairmen drafted a letter in response to the Huber report in June of 1998, expressing their disagreement with some of its conclusions. They noted in this letter a few discrepancies in the report and that they thought some of the findings of the report should be invalidated because of a potential conflict of interest. (Tr. 488-92; CX 6). The

operations manager had the response to the Huber report reviewed and evaluated by two radiation safety officers of the company and by the experts who prepared the report. (Tr. 904-05).

Drive-In Privileges

The Gary Works plant encompasses around 4000 acres on the southern end of Lake Michigan. (Tr. 984). There are in excess of 7,000 employees at this plant and about 600 of them work in the plate mill. (ALJX 1; Tr. 834, 835). The ability to drive an employee's personal vehicle into the plant is limited to those employees who are granted drive-in passes. All others must park and ride a bus into the plant. Granting of drive-in passes for the entire facility is controlled by the Department Manager of Security. The security manager testified that since he began his job in 1995, one of the edicts from plant management and from corporate risk management has been for him to reduce the amount of people driving in the facility and that he has done so every quarter. In the past, there had been problems with accidents and traffic at the main gate, along with complaints about the time it takes to get in and out of the gate. (Tr. 987-95).

The General Manager testified that the reduction of vehicles driving into the Gary Works plant has always been a concern and they were trying to reduce the number of drive-in passes for security reasons. (Tr. 793). The Manager of Operations for plate products received a telephone call from the security manager around Thanksgiving 1997. The security manager informed him that the plate mill had the largest number of employees driving their personal vehicles into the plant and that he wanted to eliminate some of their drive-in passes on January 1, 1998, the start of the first quarter. After some discussion, he agreed to make the change effective at the start of the second quarter, April 1, 1998. (Tr. 844-48).

The operations manager received a letter from the General Manager on January 21, 1998. The purpose of this letter was to discuss the operations manager's business objectives for that year. He was advised in this letter that he should add an objective for 1998 to develop and implement uniform procedures with respect to standardized handling of overtime, absenteeism, start/stop time, and drive in-passes. (RX 7; Tr. 851-52).

Prior to the second quarter of 1998, approximately 140-150 employees of the plate mill had drive-in passes. On March 19, 1998, the Manager of Operations took the first quarter list of drive-in passes, crossed off a number of names and gave the list to his secretary to re-type. Approximately eighty-five names were eliminated, including most of the systems repairmen. However, a few of the systems repairmen were allowed to retain their drive-in passes for medical reasons. (Tr. 155-56, 853-55; RX 8, 9, 10). On March 30, 1998, the operations manager advised all plate mill employees by letter that effective April 1, 1998, drive-in passes would only be issued to employees who meet one of three criteria: (1) acting in managerial capacity; (2) medical need; or (3) a personally owned vehicle is required on a daily basis to meet job requirements. (RX 11).

The complainants stated that not being able to drive their personal vehicles into the plant makes their jobs more difficult as there is a vast area around the plate mill and it takes longer for

them to travel between their job sites. They also stated that it makes getting to their jobs, carrying tools and obtaining parts more difficult. (Tr. 123-27, 220-23, 387-88). Complainants had previously driven their personal vehicles to jobs outside of the plate mill building, but ceased working on those routes two to three months after they no longer had drive-in privileges. (Tr. 55-56, 1039). Although a shop truck was made available to the systems repairmen, they indicated they did not often use it and that the truck was rarely there when they needed it. (Tr. 176-77, 221-22). The Area Manager for the plate mill testified that the systems repairmen do not need their own vehicles to perform their duties. (Tr. 1014).

Neither the complainants' supervisor nor the supervisor of the entire repair group was responsible for the reduction in the number of drive-in passes available to the systems repairmen in 1998. (Tr. 1018, 1032). The decision to reduce the drive-in passes to plate mill employees principally was made by the safety manager with input from managers of the operating units. (Tr. 987-88). The Manager of Operations of the plate mill then made the decisions as to which employees' drive-in passes would be eliminated in 1998. (Tr. 853-55; RX 8, 10).

Telephone Privileges

The General Manager of plate products stated that the company decided in June 1997 to make changes in the telephone service to provide better service at a reduced cost. (Tr. 784-85). The company purchased telephones instead of leasing them and changed the telephone system to track individual telephone costs and the number of calls made from each telephone. (Tr. 864; RX 12). The company received available data from this tracking regarding telephone usage and cost by extension number and found the telephone bills amounted to an average of $18,500 a month. (RX 1). Consequently, the Gary Works personnel were required to review their telephone service because telephone costs were to be allocated to specific work units based on their telephone usage. The company determined from the review that there was a blatant abuse of the telephone system. These abuses included calls to investment companies, credit card companies, internet, long distance and calls out of the country, as well as large numbers of local calls. Some of the complainants admitted that they made personal calls from their work telephone, including long distance calls. One complainant indeed testified that he called home two or three times a day, and that as long as it is condoned by management, an employee should be able to call home for as long as an hour or two in a day. (Tr. 394-96, 548, 720-21, 785, 863-64, 870, 880).

There are six different levels of telephone service available at Gary Works. Level A1, the lowest level, allows local calls to be made and received only within the Gary Works facility. The highest level, A6, allows calls to be made nationally and to selected international locations and allows calls to be received from anywhere. (RX 13). The Manager of Systems, Communications and Process Control sent a memorandum, dated August 1, 1997, to the Division Manager of plate products regarding controlling telephone costs by reducing the level of service and indicating that A4 should be the highest level of service for most of the telephones in the plant. Level A4 allows calls to the areas of Illinois and Indiana where all of the employees live. Attached to the memorandum were the current telephone costs for the plate mill division listed by extension number. (RX 13). The General Manager advised the Division Manager, by letter dated April 7, 1998, that

telephone costs for the previous month totaled $18,571. He also requested a review of the listing of telephone costs by extension number and that he be advised why the highlighted units required service higher than that provided by the A1 level. (RX 1). The General Manager also questioned why anyone at the local plant could call anywhere in the world. He wanted his direct managers to review this information and report back to him. Most of the replies were received around April 23, 1998. (Tr. 785-86).

After a review of the telephone lists for type of service and necessity, the company decided to disconnect twenty-four lines, delete four from plate mill responsibility, downgrade twenty-one lines and to correct other problems. (RX 14, 15, 16). There were approximately one-hundred and thirty to one-hundred and forty telephones in the entire plate mill. (Tr. 872). The systems repairmen had four extensions in their area. Changes were made on about fifty of the telephones in the Gary Works facility. In the complainants' area, one extension was eliminated, two were reduced to level A1 service and no changes were made to the supervisor's telephone. (Tr. 874). Although the recommendations were to take effect April 30, 1998, it took around two weeks after that for all the changes to take place. (Tr. 876-77). After the changes were made, complainant Marjan Trajkovski requested that the company at least update the telephone service to allow incoming calls so that their families could contact them when needed. This change was made. (CX 7; Tr. 367, 534-35). There are four pay telephones within the Gary Works facility that the systems repairmen can use for personal use and their supervisor has the discretion to allow the employees to use his telephone for personal or business use. (Tr. 881-82).

Complainants stated that the repairmen were never given a reason, either orally or in writing, for the telephone changes. The repairmen testified that there were no complaints about misuse of the telephone system mentioned to them prior to the loss of the telephone privileges. (Tr. 170, 400-01). Complainants believe the telephone changes make their job duties more difficult, since they are unable to call for technical support. (Tr. 223-25).

Neither the supervisor of the systems repairmen nor the supervisor of the entire repair group was responsible for the reduction in the telephone services available to the employees in 1998. (Tr. 1018, 1032). This decision principally was made by upper level management. (Tr. 784-85, 996-997). However, the Manager of Operations made the specific recommendations to reduce or eliminate telephone services for the extensions within the plate mill including those pertaining to the systems repairmen. (Tr. 871-872; RX 14-16).

Timkin Schedule and Overtime

As part of yearly objectives, the General Manager asked the Manager of Operations to look at several issues in January 1998, one of which was overtime. (Tr. 805; RX 7). Prior to May 1, 1998, the majority of the systems repairmen worked rotating shifts which included three weeks of day shift, one week of evening shift from 3:00 pm to 11:00 p.m. and one week of midnight shift. (Tr. 114-15). The evening and midnight shifts are often referred to as "back turns" within the company. The operations manager decided to implement a change to a Timkin schedule as a part of his 1998 objectives, although he had discussed such a change in December of

the preceding year. A Timkin schedule is a rotation schedule consisting of one week of day shift, one week of midnight shift and one week of evening shift. The operations manager stated that this type of schedule had benefitted other crafts in the company and he decided to implement the Timkin schedule for the systems repairmen to improve efficiency by putting a supervisor on all shifts and a greater number of competent employees on the evening and midnight shifts. The end result of the Timkin schedule simply is that it provides for more people working the evening and midnight shifts at one time than there were prior to the change. (Tr. 161-63, 884-91). Also, the non-Timkin shifts resulted in additional overtime expense due to the method of scheduling. (Tr. 956-963). Other crafts in the plate mill, as well as the two other main crafts in the maintenance area, had been on the Timkin schedule for a number of years.

The Area Manager of Maintenance at the plate mill testified that he was involved in the discussions about the Timkin schedule and that the final decision to implement a Timkin schedule was made by him in January 1998. The Area Manager is responsible for several other crafts at the plate mill and all the rest of his crews work a Timkin schedule. He indicated that the benefits include simplified scheduling and less scheduled overtime. (Tr. 1002-08). He indicated that it takes some time for the company to implement this type of change. The first Timkin schedule was posted on April 30, 1998, and the majority of the systems repairmen began working this schedule the first week of May.

One of the complainants testified that since there are less employees working the day shift on the Timkin schedule, the number of projects have been reduced, thereby reducing the amount of overtime available to the systems repairmen. (Tr. 226). However, the operations manager explained that in regard to overtime there are a myriad of items to consider that cannot be understood by just viewing raw data. He stated that these factors include such items as capital projects in which certain employee groups are involved, the workload in each functional group, customer demand and the need for production, and the breakdown of equipment. (Tr. 1051-57).

Prior to the implementation of the Timkin schedule, several of the systems repairmen had worked a schedule similar to the Timkin while stationed in the computer room. However, they requested a transfer from the computer room so that they could return to their old work schedule. These repairmen believe they had an agreement with management to retain their old work schedule and that management failed to comply with this agreement in changing the repairmen to the Timkin schedule. (Tr. 422-28, 434-35, 1008-13).

Some of the complainants were told by supervisors that they were put on a Timkin schedule by management so that their schedules would be in line with the motor inspector's crew and the millwright's crew and to provide a supervisor on each shift. They stated that they were also told the Timkin schedule was implemented so that they could report with the motor inspectors for job assignments, safety contacts, and safe job procedures, but that these meetings were stopped after two or three weeks. (Tr. 131-132, 229-31). One complainant testified that he asked a supervisor why the systems repairmen were switched to the Timkin schedule and was told that apparently their new supervisor did this because he was upset with some of the repairmen. (Tr. 416-20).

The supervisor of the systems repairmen was not responsible for implementing the Timkin schedule in 1998. (Tr. 1031). That decision was made by the Area Manager of Maintenance of the plate mill. (Tr. 1002-1003, 1031). However, the Manager of Operations had initiated discussions regarding the need for this change in 1997. (Tr. 884).

Employee Concerns

The systems repairmen believe they had been labeled as "troublemakers" by the company and that they were treated unfairly by their supervisors. Complainant Marjan Trajkovski even requested a new position in the boiler house to get out of what he felt was a hostile environment in the plate mill. He initially was granted the position, then the supervisor of the boiler house showed some hesitancy and wanted to first set up an interview, which apparently was outside of the normal transfer procedure. This complainant had a short, informal talk with the supervisor who expressed some concern because he had heard about some trouble in the plate mill. (Tr. 512-31).

Mr. Trajkovski also felt he was treated unfairly when his previous supervisor wanted to check his locker before he transferred to the boiler house. (Tr. 519-22). This supervisor explained that he was unsure of the correct procedure and that when he asked the systems repairmen's supervisor about this procedure, he was told to check the locker to insure that none of the equipment of the repair group was being taken to the boiler house. When this complainant refused to let the supervisor inspect the locker, the supervisor contacted the area manager and was informed that there was no need for an inspection. (Tr. 1020-22).

Complainants described being threatened by their new supervisor that they would be placed on the Timkin schedule or be fired if they kept submitting paperwork to him. They also testified to incidents that they believed demonstrated the company's lack of concern for their safety. They described an instance in April of 1997 of another supervisor trying to force them to perform repairs on a laser lens. This job had previously been performed by an outside contractor, and they refused to do the work until a safe job procedure could be established. (Tr. 61-77, 180-84; 353-55). Complainants also described a supervisor threatening them with losing their jobs after a grievance was filed with the union over the laser lens incident. (Tr. 269-80). They also described what they believe to be unfair job assignments such as their supervisor assigning very heavy work loads to the repairman who is their representative with the NRC and OSHA, while others were given very light duties. They complained that in June of 1998, certain systems repairmen were taken off one job to perform another job which was described as "nasty." (Tr. 192-198, 316-19; CX 3). Two repairmen also reported an instance in March or April of 1998, when they were required by their new supervisor to pick up trash and to do cleaning that was not part of their normal responsibilities. (Tr. 86-95, 361-66, 1035).

The systems repairmen also described instances of being threatened with losing their jobs if they kept asking questions. (Tr. 116-123, 314-16, 497-501, 563-66). The complainants also testified that they were told by some of their supervisors that their new supervisor was "out to see them fail" and "screwing with their drive-in passes and telephone privileges." (Tr. 291-92, 435-

38). Complainants also alleged that they were threatened by the radiation safety officer on May 5, 1998, with losing their jobs if they kept pushing the issue of whether it was safe for them to work on the isotope gauge. (Tr. 652-54).

Some of the complainants stated that they did not have problems with their previous supervisor and that they were never disciplined or questioned about their work before their new supervisor arrived. (Tr. 335-36). Marjan Trajkovski testified that he held the position of vicing foreman until the new supervisor took over the systems repair group. He resigned the position around March of 1997, because he was unable to work under the new supervisor's rules. (Tr. 471-79). Mr. Trajkovski also stated that the new supervisor complained to him that he wasn't getting the cooperation he needed to obtain more equipment which could mean more power to the systems repairmen. This complainant alleged that the new supervisor told him that he wanted the bickering and complaining for the horn on the isotope gauge to stop or consequences would be paid. No other safety concerns were discussed with Mr. Trajkovski. (Tr. 502-12).

One of the complainants expressed safety concerns about the removal of the laser assembly from under the roll line, the location and decibel level of the north gauge horn and a complaint regarding the video monitors. The first of these complaints took place in late February or early March 1998. None of these complaints involved any type of radiation exposure or the isotope gauges. (Tr. 221-24).

The supervisor of the systems repairmen, some of whose actions partially led to the filing of the complaint involved in this case, was relieved of his responsibility over the systems repairmen in late November of 1998. (Tr. 1030-38)

Timeliness of the Appeal

The seventeen systems repairmen filed a complaint on June 18, 1998 with NRC alleging that they were discriminated against by the loss of their drive-in passes and telephone privileges, and by the implementation of the Timkin schedule and loss of overtime. The matter was referred to OSHA on June 30, 1998 and an investigation of the complaint was conducted by that agency over the next six months. The Area Director of OSHA notified U.S. Steel, as well as the complainants, as a result of the investigation of the agency's determination regarding the complaint by letter dated December 31, 1998, which was mailed by certified mail on January 4, 1999. (ALJX 1).

The determination letter was received by U.S. Steel on January 6, 1999, and the employer filed a request for a hearing by first class mail on January 8, 1999. (ALJX 3). U.S. Steel also mailed copies of its appeal to the complainants by first class mail on January 8, 1999. (ALJX 3). Complainants received copies of U.S. Steel's appeal at varying times within the following week. (Tr. 452, 534, 598-99, 692). U.S. Steel's appeal was received in the Office of Administrative Law Judges on January 12, 1999. (ALJX 3).

Complainant John Lazur also filed an appeal of the determination by facsimile on January 13, 1999. (ALJX 2; Tr. 690). The majority of the complainants filed their appeals by facsimile on that same date with the assistance of Mr. Lazur. (ALJX 2; Tr. 533, 690). Complainant Michael Johnson's appeal was filed by facsimile on January 14, 1999.

CONCLUSIONS OF LAW

Timeliness of the Appeal

The applicable regulation, 29 C.F.R. § 24.4(d), provides the guidelines for filing an appeal of the Department of Labor's notice of determination to the Office of Administrative Law Judges. This section in part provides:

> (2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.
>
> (3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for hearing shall be sent by the party requesting a hearing to the complainant or the respondent, as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service.

29 C.F.R. § 24.4(c)(2) and (3).

Complainants, in their motion to dismiss, rely on the decisions in *Webb v. Numanco, L.L.C.*, 98-ERA-27 and 28 (ALJ Jul. 17, 1998), *vacated on other grounds*; (ARB 98-149 Jan. 29, 1999); *Staskelunas v. Northeast Utilities Co.*, 97-ERA-8 (ALJ Dec. 4, 1997); and *Backen v. Entergy Operations, Inc.*, 95-ERA-46 (ARB June 7, 1996). U.S. Steel contends that the complainants' reliance on the *Webb* decision is misplaced. It notes that the complainant in that case timely appealed the April 29, 1998 determination by OSHA on May 6, 1998, but untimely served a copy of that appeal on Numanco by first class mail on May 11, 1998. That complainant also failed to serve the second respondent by any method of service as of January 29, 1998. As correctly noted by U.S. Steel, the administrative law judge found that:

> A party's failure to properly serve an opposing party in accord with the regulations gives rise to inherent prejudice to the opposing party because the failure of service affects the opposing party's ability to respond to an appeal by timely cross-appeal or may cause the party to rely on an OSHA finding which is inoperative.

Webb, *supra*, Slip Op. at p. 5.

Respondent contends the *Webb* decision is distinguishable from this case because the complainant in the *Webb* decision waited at least five days before mailing copies of the notice of appeal to the respondents and because neither of those respondents filed a notice of appeal. U.S. Steel essentially argues that none of the complainants in this case was prejudiced by U.S. Steel's service of the copies of the notice of appeal by regular mail on the same date the appeal was mailed to the Office of Administrative Law Judges because each of the complainants filed his own notice of appeal of the final determination.

I agree with U.S. Steel's position on the *Webb* case. I can find no prejudice on the part of any of the complainants by the respondent's timely filing of its notice of appeal with the Office of Administrative Law Judges by regular mail and by serving copies of the notice on the complainants in the same manner on the same date. I further conclude that the *Webb* case is not controlling simply because I disagree with the conclusions rendered therein. Rather, I concur with the judge's ruling on respondent's motion for dismissal in *Stoner v. General Physics Corp.*, 98-ERA-44 (ALJ Sept. 4, 1998). The respondents in the *Stoner* case argued that the Office of Administrative Law Judges did not have jurisdiction over Mr. Stoner's complaint, although the complainant timely filed a request for a formal hearing by facsimile with the Office of Administrative Law Judges, because "the complainant was derelict in failing to serve a copy on the *same date* and secondly by failing to serve a copy by the *regulatory means specified*." *Stoner, Id.*, Slip Op. at p. 2. After discussing the pertinent regulatory provisions and law, the administrative law judge in the *Stoner* case rejected the reasoning in the *Webb* case and relied on the solution set forth in *Jain v. Sacramento Municipal Utility*, 89-ERA-39 (Aug. 3, 1989), *aff'd*, (Sec'y Dec. Nov. 21, 1991). In doing so, the judge in *Stoner* explained on page 8 of his opinion that:

> Nor can I find any "inherent prejudice" in a complainant's failure to properly serve an opposing party with a copy of a request for a hearing. In *Jain*, the copying requirements, then in effect, with which the complainant had not complied, were found to be merely directive rather than jurisdictional in nature. The jurisdictional requirements of the regulation were found met by the complainant's filing of a request for hearing with the Chief Administrative Law Judge. I observe that the present "service" provision is contained in a paragraph separate from that stating that a failure to timely request a hearing makes the notice of determination the final order of the Secretary. Nothing in the regulations indicates that a failure to serve a copy of the hearing request is either jurisdictional or that such a failure affects the validity of the filing. Paragraph 24.4(d)(2) only states that failure to timely <u>file</u> a hearing request will result in the notice of determination becoming the final order

> of the Secretary. "Filing" is nowhere equated with sending a copy of the hearing request to the respondent.

(Footnote omitted).

I further find that the decisions in the *Staskelunas* and *Backen* cases are not supportive of the complainants' position. In *Staskelunas v. Northeast Utilities Co.*, 97-ERA-8 (ALJ Dec. 4, 1997), the appeal to the Office of Administrative Law Judges was filed by certified mail and was not received within the time frame provided in the regulations. Although the complainant in that case used certified mail rather than the methods of service specifically provided in 29 C.F.R. § 24.4(d)(3), the appeal was dismissed because it was untimely filed. In doing so, the Administrative Review Board explained that "[a] complainant who relies on alternative means for delivery, *e.g.*, by mail, assumes the risk that the request may be received beyond the due date, and untimely." *Staskelunas*, Slip Op. at p. 2. Similarly, in *Backen v. Entergy Operations, Inc.*, 95-ERA-46 (ARB June 7, 1996), the notice of appeal was sent by regular mail and received beyond the time for filing an appeal. The Administrative Review Board noted that "[t]he law is clear that the time limitation period is to be strictly construed. *Gunderson v. Nuclear Energy Services, Inc.*, Case No. 92-ERA-48 (Sec'y Dec. Jan. 19, 1993)." Thus, neither of these cases directly support the argument that a timely filed request for hearing, received by means other than that specified in the regulations, fails to meet the filing requirements of an appeal.

Complainants argue that the filing of the appeal by first class mail, and not by one of the methods listed in the pertinent regulation (fax, telegram, hand-delivery or next-day service), is a failure to comply with the service requirements. They also contend that copies of the request for hearing were not filed on the complainants within the applicable time limitations. They explained in their post-hearing brief that the final determination shall become the final order of the Secretary of Labor unless it is appealed within five business days of its receipt by the means specified in 29 C.F.R. § 24.4. Complainants therefore request that the respondent's appeal be dismissed. (ALJX 6; Tr. 15-22).

The regulation at issue, 29 C.F.R. § 24.4, was amended on March 11, 1998. The time for filing an appeal was changed from five calendar days to five business days, and the means of service were set out to include "facsimile (fax), telegram, hand delivery, or next-day delivery service." Other language was added regarding the manner of sending notice of the appeal to the other parties in the proceeding. The legislative history of this amendment explains that the changes regarding the means of service were added, "to conform the regulations to current business practices." 63 Fed. Reg. 6614 at 6617. Although first class mail is not listed as an acceptable means of service, there is no indication of an intent not to consider an appeal, which is filed in a timely manner, merely because it was filed by means other than specified in the regulations.

There are no cases specifically involving the issue of whether an appeal, timely filed with the Office of Administrative Law Judges and the other parties, by means other than that specified in 29 C.F.R. § 24.4(d)(3), is acceptable. Several cases support the position that the time limit for

the filing of a request for hearing must be strictly construed, *e.g. Degostin v. Bartlett Nuclear, Inc.*, 98-ERA-7 (ARB May 4, 1998); *Backen v. Entergy Operations, Inc.*, 95-ERA-46 (ARB June 7, 1996). I reiterate, however, that these cases focus on the timing of the appeal, not the means of service. It is difficult to see why the means of service is even relevant, as long as the appeal is timely. Although the acceptable means of service are specified in the recent amendment to the regulations, I reiterate that there is no evidence that this was done to prevent regular mail as a means of service if the appeal reaches the Office of Administrative Law Judges in a timely manner. I also reiterate that the Administrative Review Board indirectly indicated its position on this issue in *Staskelunas v. Northeast Utilities Co.*, 97-ERA-8 (ARB May 4, 1998) when it explained that "[a] complainant who relies on an alternative means of delivery, *e.g.*, by mail, assumes the risk that the request may be received beyond the due date, and untimely." I believe this to be the best approach, as there can be no prejudice to the other parties if the Office of Administrative Law Judges and the opposing party is served with the notice of appeal within the time limits provided in the regulations. Quite simply, the manner of service should be deemed irrelevant as long as service is timely. Thus, I deny the complainants' motion to dismiss the respondent's notice of appeal.

Protected Activity and Adverse Work Actions

Generally, to prevail on a claim under the ERA, the complainant must establish a *prima facie* case of discrimination by evidence that he or she was engaged in activity protected by the ERA and that adverse action was taken against the employee because of protected activity. *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277-79 (7th Cir. 1995). Once complainant meets this initial burden, the employer has the opportunity to rebut this finding by establishing the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant then has the opportunity to prove that the employer's reasons for the adverse action were actually a pretext for retaliation. However, in cases where the employer asserts a non-discriminatory reason for discharge, the *prima facie* step can be bypassed, and I can proceed directly to an inquiry into whether the employer's reason is pretextual. *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom, Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998).

Initially, I note that my jurisdiction is limited by law in this case to deciding only whether the complainants were discriminated against because they engaged in protected activity under the ERA. I am limited to deciding only this issue and cannot consider whether the employer acted properly in making decisions unrelated to the complainants' protected activity. Likewise, I do not have the authority to decide whether the complainants' supervisors acted improperly unless those actions were related to the protected activity under the ERA. My inquiry must focus solely on whether the complainants' protected activity was the reason for the adverse actions taken by U.S. Steel.

The parties dispute whether complainants engaged in any protected activity prior to the time the complainants were informed of the missing dosimeter badges. Specifically, the parties disagree on whether the complainants' requests for badge information prior to April 29, 1998

constitute protected activity. Not every act an employee commits under the auspices of safety is protected under the whistleblower provisions of the ERA. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity under the ERA. *Bechtel Construction Co. v. Secy. of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). However, making general inquiries regarding safety issues does not qualify as protected activity. *Id.*

In this case, some of the complainants requested their dosimeter badge information prior to the April 29, 1998 meeting. However, there is no evidence that these requests were motivated by specific, particular safety concerns. There was no evidence that the complainants made more than a general request for this safety information. While Jason Lax made a second request to another supervisor after not receiving the information, none of the complainants stated that they continued to follow up on their requests after they did not receive the information. There did not appear to be any particular, specific concern for safety that prompted these requests. Jason Lax stated he requested the information because he had asked for it in the past and hadn't seen a report in a while. Marjan Trajkovski stated that he had spent a substantial amount of time on the gauges and requested the information because he "just wanted to know."

While it is possible that requests for dosimeter badge information could constitute protected activity under different circumstances, I find the requests in this case do not rise to that level. The evidence indicates the requests were general inquiries for safety information similar to the requests the repairmen made to their prior supervisor and were not specific, repeated requests or complaints because of a particular concern. For this reason, I find these requests do not constitute protected activity under the ERA.

Complainant John Lazur also expressed safety concerns regarding the removal of the laser assembly from under the roll line, the location and decibel level of the north gauge horn, and the video monitors. However, Mr. Lazur stated that these complaints did not involve the isotope gauges or radiation. In a retaliation claim under the ERA, the protected activity must relate to nuclear or environmental concerns or must further the purposes of that act. *See* 42 U.S.C. § 5851(1)-(3); 29 C.F.R. § 24.2; *Tyndall v. United States Environmental Protection Agency*, 93-CAA-6 (ARB June 14, 1996). The safety complaints made by Mr. Lazur do not meet these qualifications as they are unrelated to the isotope gauges or radiation.

Complainants allege other instances of protected activity which occurred after the April 29, 1998 meeting. However, the adverse actions alleged by complainants took place prior to most of these instances. This protected activity included repeatedly requesting badge information out of a particular concern, calls and complaints to the NRC, and sharing of group safety concerns after they were informed the badges had been lost. Safety concerns were also expressed to management such as reducing work on the gauges after the June 18, 1998 meeting, responses to the Huber report, and concerns regarding the wiring of the safety mechanisms of the isotope gauges. These activities clearly qualify as activity which is protected under the ERA. However, any protected activity must have occurred prior to the retaliatory conduct in question to establish a causal relationship. For the following reasons, I find that the protected activity took place after

the specific acts of alleged discrimination and all occurred after these adverse actions were first set in motion by the employer.

First, U.S. Steel has demonstrated that the decision to restrict drive-in passes was made long before the systems repairmen were aware of the missing badge information. Moreover, this decision was made as part of a plant-wide reduction in drive-in passes. The complainants were a small part of eighty-five employees who were not issued these passes in the second quarter of 1998. The evidence documents an ongoing attempt by management to reduce the number of vehicles entering the U.S. Steel plant and a letter outlining the conditions under which passes would be issued in the future was written to all employees prior to the change. I also note that some of the systems repairmen who met the required medical criteria were issued drive-in passes.[2] Again, I emphasize that I am not in a position to consider whether the systems repairmen need their automobiles to perform their jobs, or whether the employer made the correct decision in eliminating the drive-in passes. I am limited by jurisdiction to deciding only whether the drive-in privileges were taken away from the complainants as a result of their protected activity, and the evidence simply does not support this allegation.

Secondly, U.S. Steel has established that the reduction in the level of telephone service available to the systems repairmen was part of a division-wide attempt to reduce telephone costs. The evidence proves that U.S. Steel's management was reviewing individual costs within the company in 1997 and that changes in telephone usage in April of 1998 were made as a result of that analysis. As with the drive-in passes, the systems repairmen were only a small part of the employees whom the changes affected. The level of service was changed on about fifty of the telephones, only four of which were under the responsibility of the systems repairmen. Whether the complainants need greater telephone access or whether the abuse of the telephones justified the decisions made by U.S. Steel is not the focus of my consideration. The only factor for me to address, given my limited jurisdiction, is whether the evidence establishes that U.S. Steel decided to reduce telephone access of the systems repairmen in response to their involvement in protected activity. The evidence in this regard proves the changes were for legitimate business reasons and that the decision to implement the changes took place prior to the protected activity.

Next, the complainants allege they were placed on the Timkin schedule and that their overtime was reduced as a result of their protected activity. However, the evidence in this regard proves the scheduling decision was made as a result of management's desire to cut costs and to cover all of the shifts with a greater number of competent employees. The majority of the other crafts in the plate mill had been switched to a Timkin schedule years before and management recognized the advantages to this type of scheduling. Part of the reasoning for this change was to reduce the amount of overtime hours. The evidence proves the decision to change the work schedule of the systems repairmen was made in January of 1998 by the Area Manager of Maintenance after considerable discussion with the operations manager. The change was

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[2]I found it unnecessary to specify which complainants retained their drive-in passes because I concluded this work action was not discriminatory.

coincidentally made effective on April 30, 1998 and unquestionably was not due to any protected activity that occurred in that month.[3] Rather, I find that U.S. Steel has established a legitimate business reason for the change to the Timkin schedule, which resulted in a reduction in overtime for the complainants. The evidence presented by the employer on this area of alleged discrimination, as well as that offered in regard to the drive-in passes and telephone privileges, is clear and convincing that such action was motivated solely by business considerations.

Since the employer has provided a legitimate business reason for each of the four areas of alleged retaliation, I must now determine whether the employer's stated reason was a pretext for discrimination. *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom, Carroll v. U.S. Dept. of Labor,* 78 F.3d 352 (8th Cir. 1996). Complainants allege that the evidence of the relationship with management, disparate treatment and management response to environmental concerns all constitute evidence that the employer's motivation was retaliation.

Complainants initially point to the testimony of the Manager of Operations that in general he has no problems with the quality of work or the personalities of any of the service repairmen. They go on to note that there were no difficulties in the relationship between management and the systems repairmen until encounters with their new supervisor. However, I find that this evidence does not indicate that the relationship with management changed after safety issues were raised, but only that the relationship changed with the appointment of a new supervisor for the systems repairmen. The change in relationship does not evidence any type of retaliatory motivation and instead tends to indicate that the relationship problems were grounded in personality conflicts that began with the arrival of the new supervisor.

Complainants also allege disparate treatment by the employer as evidence of a retaliatory motive. In particular, complainants maintain that Mr. Pineda's assignment to "back turns" after requesting his badge information, requiring two of the repairmen to pick up trash, and the unfair distribution of work assignments evidence management's intent to discriminate. These instances may show these complainants were treated differently from other repairmen, but do not prove that as a group the systems repairmen were treated differently than other similarly situated employees. Complainants also allege that the technicians in the boiler house to which Mr. Trajkovski was transferred, are employees in similar positions, but that they maintained their drive-in privileges. However, the evidence shows that these technicians work in a different part of the facility and only work day shift. Thus, the decision to let them retain their drive-in privileges was to make it easier for them to have access to the plant in case an emergency would arise during the back turns. With respect to the incidents involving the picking up of trash by some of the systems repairmen, this took place prior to the time that the systems repairmen were made aware of the missing badge information; thus, it could not have been in retaliation to their involvement in protected activity. Moreover, I find that the employer has established legitimate business reasons for its actions and has demonstrated that all of the changes perceived to be adverse work actions

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[3]I again note that not all of the complainants were affected by this job action but I made no specific findings in this regard because of my conclusion that this action was not discriminatory.

were set in motion long before management or the systems repairmen were aware of the missing dosimeter badges. I therefore find that the complainants have not met their burden of proving that the employer's explanation for its actions was in reality a pretext for discrimination.

Complainants also allege that a comparative analysis of the schedules worked by the systems repairmen, motor inspectors and millwrights shows the repairmen were treated differently in the application of overtime. The evidence indicates that in reality the loss of overtime was due to several factors and that the implementation of the Timkin schedule automatically caused a reduction in "scheduled" overtime. Moreover, there was a reduction in the number of work projects because there were more people on back turns and less people working the day shift when such projects usually arose. Additionally, the operations manager testified to other factors which must be considered in looking at the reduction in overtime. I therefore find there is no evidence to indicate that the reduction of overtime of the systems repairmen was motivated by retaliation for safety concerns even if the level of overtime for these repairmen is different from other groups in the plate mill.

The systems repairmen also claim that the response of management to safety concerns indicates the existence of a retaliatory motive. Specifically, they note the new supervisor's statement that Mr. Pineda was acting like another employee who always raised safety concerns; that the statement by this supervisor that they would continue to work a Timkin schedule as long as the paperwork kept piling up on his desk; and, the Safety Radiation Officer's alleged threat of termination if they kept pushing the issue of whether they should work on the isotope gauge after being advised of the missing dosimeter badges. As discussed above, the supervisor of the systems repairmen was not responsible for the change to the Timkin schedule, although the complainants allege that this supervisor claimed he had such power. I recognize that the statements of these individuals tend to indicate some degree of a lack of concern for safety by those persons. However, the evidence proves the comments were not made by persons who were responsible for the adverse work actions in question, and there is no evidence that the persons responsible for making these decisions either had a lack of concern for safety or that they even treated the subject lightly.

In conclusion, I find the alleged retaliation by the employer was the result of business planning that commenced long before the systems repairmen became aware that their dosimeter badge information was missing. The complainants' drive-in passes were eliminated on April 1, 1998, after consideration by the company which began around November of the preceding year. Similarly, the change in the telephone access took place at the end of April or the first few weeks of May, but was the result of management's evaluations of telephone usage on a plant-wide basis that commenced in the summer of 1997. I additionally emphasize that the systems repairmen were only a small part of the total changes made by U.S. Steel in the use of drive-in passes and telephones. Finally, the evidence clearly shows that the discussions regarding changing the systems repairmen to the Timkin schedule started in 1997 and the decision was made in January of 1998, before anyone, including management, was aware of the missing badges.

Assuming *arguendo* that the complainants' general requests for badge data could be held to constitute activity protected by the ERA, the evidence convinces me that the work actions at issue in this case were taken solely for business reasons. There is no evidence proving the supervisory personnel to whom the requests were made were responsible for the work actions. Also, the record does not establish that those responsible for the changes were aware of the requests.

I should finally add that complainants have discussed other conversations, encounters and situations with management in their post-hearing briefs which they feel demonstrate that they were treated unfairly and without respect. I have not addressed these allegations because the evidence does not support any type of connection between these events and the protected activity of the systems repairmen. As I indicated initially, my jurisdiction in this case is limited to only the question of whether protected activity played a role in the changes made by U.S. Steel. The complainants simply have not proven that such activities were in any way related to these changes.

There is no question that the implementation of the work actions unfortunately coincided to some extent with the discovery of the missing dosimeter badge information. Also, the lack of discussion or communication by management with the systems repairmen about the impending changes, together with the hostile environment created by conflicts with the new supervisor about various non-radiation issues, understandably led the systems repairmen to question the reasons for the job changes. The supervisor's apparent attempt to make the systems repairmen believe that he was responsible for these job actions also added to the complainants' distrust of the company's need to make these changes. Notwithstanding, the evidence unequivocally shows that management took all of the actions for legitimate business reasons and that none of them was motivated by the complainants' safety concerns. While the systems repairmen may not like these job changes, they perhaps now understand why management implemented them. Hopefully, understanding on both sides, together with the supervisory change over the systems repairmen, will allow these parties to move forward and resolve such conflicts amicably in the future.

RECOMMENDED ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED to the Secretary of Labor that the complaint of the seventeen named systems repairmen be dismissed.

DONALD W. MOSSER
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).